No. 96-1104

Supreme Court, U.S.
FILED
MAR 28 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH MAZUREK, in his official capacity as Attorney General of the State of Montana,

Petitioner,

—v.—

JAMES H. ARMSTRONG, M.D.; MARK MILES, M.D.; SUSAN WICKLUND, M.D.; SUSAN CAHILL, P.A.; MARY STRANAHAN, D.O.; BETH E. THOMPSON, M.D.; and EDWIN L. STICKNEY, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada and on behalf of a class of performing and referring physicans,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

BRUCE MEASURE
Law Offices of Ambrose Measure
P.O. Box 918
Kalispell, Montana 59903-0918
(406) 752-6373

TURNER GRAYBILL
Graybill, Ostrem, Warner & Crotty
18 Sixth Street North, Suite 200
Great Falls, Montana 59401
(406) 452-8566

JANET BENSHOOF
(Counsel of Record)
SIMON HELLER
BONNIE S. JONES
The Center for Reproductive Law & Policy
120 Wall Street, 18th Floor
New York, New York 10005
(212) 514-5534

Counsel for Respondents

36pp

QUESTION PRESENTED

Whether the court of appeals correctly directed the district court, in considering respondents' motion for a preliminary injunction against a Montana abortion statute, to balance the hardships between the parties, where the district court had failed to do so previously?

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Respondents James H. Armstrong, M.D., *et al.*, respectfully submit the following brief in opposition to the petition for certiorari filed by Joseph Mazurek, the Attorney General of Montana (hereinafter "petitioner" or "the State"), docketed on January 13, 1997.

OPINIONS BELOW

The opinion of the district court is reported at 906 F. Supp. 561 (D. Mont. 1995). The opinion of the court of appeals is reported at 94 F.3d 566 (9th Cir. 1996).

ADDITIONAL RELEVANT CONSTITUTIONAL PROVISION

Article I, Section 10 of the United States Constitution provides in relevant part:

> No State shall . . . pass any Bill of Attainder . . . .

COUNTERSTATEMENT OF THE CASE

This case was filed on July 31, 1995, as a constitutional challenge to Chapter 321 of the 1995 Montana Session Laws, passed as House Bill No. 442 (hereinafter "HB 442") by the Montana Legislature. HB 442 amended the Montana Abortion Control Act with three criminal restrictions on abortion: (1) a new, specific ban on the performance of abortions by physician assistants in Montana (and hence singling out respondent Armstrong as the only physician in Montana prohibited from utilizing a physician assistant for parts of his practice); (2) a requirement that abortions be performed in a licensed hospital "after the first 3 months of pregnancy;" and (3) and a prohibition on soliciting or advertising abortion. *See*

29a-30a.[1] In addition, HB 442 amended the 1983 Montana statutory scheme enabling physician assistants to perform certain approved medical procedures when licensed physicians apply to supervise them. *See* 29a (amending Mont. Code Ann. § 37-20-103).

On September 29, 1995, the district court granted plaintiffs' motion for a preliminary injunction against the second-trimester hospitalization requirement and the advertising ban. However, the district court severed the statute and denied a preliminary injunction against the ban on the performance of abortions by a physician assistant, writing:

> The court recognizes that the plaintiffs' challenge to the "physicians only" provision raises a serious question, but is not convinced that under [sic] the balance of hardships is such that the court must strike the balance in favor of the plaintiffs' request.

16a.

On appeal, the court of appeals agreed in part with the district court:

> [W]e conclude, as did the district court, that the appellants presented a "serious question" requiring a balancing of the hardships to determine the appropriateness of preliminary relief.

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[1]Citations to the Petition are in the form "Pet. ___"; citations to its appendix are in the form "__a"; and citations to the appendix to this Brief are in the form "A-__." Citations to declarations filed in the district court are in the form "[Declarant's surname] Dec. ¶ __"; citations to depositions are in the form "[Deponent's surname] Dep. __."

7a. However, the court held that the district court did not comply with the Ninth Circuit's preliminary injunction standards because "[t]he district court . . . did not truly balance the hardships," 7a, and called special attention to the failure of the district court to "address the countervailing hardships to the State, or the absence of them." 8a. Accordingly, the court of appeals vacated the district court's decision and remanded for further proceedings. *Id.*

Petitioner's petition for rehearing was denied, and his suggestion for rehearing *en banc* was rejected, with no active judge of the court of appeals requesting a vote on whether to rehear the case *en banc*.

HB 442 is far more than a "physician only" abortion statute, as the State seeks to portray it. Beginning in 1977, respondent Cahill, a physician assistant-certified (P.A.) licensed to practice in Montana, has performed first-trimester abortions in Kalispell, Montana, under the supervision of plaintiff Armstrong, a physician licensed to practice medicine in Montana. Cahill Dec. ¶ 10. Since 1983, Cahill has performed abortions under a utilization plan approved by the Montana State Board of Medical Examiners ("the Board"), Cahill Dec. ¶ 8, which has likewise approved approximately ninety P.A.'s to work under various physicians performing some 200 procedures with varying degrees of supervision according to the procedures' risks. No disciplinary proceedings have ever been brought before the Board against P.A. Cahill, nor has she ever been sued for malpractice. Cahill Dec. ¶ 10. The licensing scheme for P.A.'s contains specific procedures to insure due process for P.A.'s before areas of their practice may be removed. *See* Mont. Code Ann. § 37-20-104.

Prior to enforcement of HB 442, P.A. Cahill performed the majority of first-trimester abortions at Dr. Armstrong's office; Dr. Armstrong performed some first-trimester abortions and all the second-trimester abortions. Cahill Dec. ¶ 12. Under the utilization plan approved and periodically re-approved by the Board for P.A. Cahill since 1983, Dr. Armstrong was required to be in the office and available to her while she was performing abortions. Cahill Dec. ¶ 10.

P.A.'s perform a critical public health function in Montana; they are authorized to perform a range of some 200 medical procedures and treatments, many of which pose greater health risks to patients than first-trimester abortions. For example, P.A.'s are authorized to prescribe virtually all medications, many of which have much higher complication (morbidity) rates and much higher mortality rates than abortion. Cahill Dec. Exh. D; Grimes Dec. ¶ 10. Also, P.A.'s are authorized to deliver babies even without a physician in the office, Cahill Dec. ¶ 10 & Exh. C, and childbirth involves mortality risks ten times that of first-trimester abortion. Grimes Dec. ¶¶ 7-8. By contrast, Ms. Cahill's state-approved utilization plan requires Dr. Armstrong to be in the office when she performs abortions. Cahill Dec. ¶ 10.

Abortion providers in Montana are a group that is hated and targeted by a segment of the public. Respondents Armstrong and Cahill -- along with other providers in Montana, such as respondent Wicklund -- have been targeted by anti-abortion activists, whose stated goal is to stop them from providing abortions. Armstrong Dec. ¶¶ 19-22; Wicklund Dec. ¶¶ 8-15. These activists have vilified them in newsletters and picketed them at their offices and church. Armstrong Dec. ¶ 19. The office in which Dr. Armstrong and P.A. Cahill practice was

destroyed by an unsolved arson, which Dr. Armstrong attributes to anti-abortion extremists. *Id.*

The impetus for the legislature to punish Ms. Cahill and Dr. Armstrong came only after attempts to have them prosecuted failed. Anti-abortion activists have also sought to stop Armstrong and Cahill from providing abortions by enlisting the assistance of Montana government officials. In 1992, anti-abortion representatives of the Montana Right to Life Association (MRTL) and Flathead Pro-Life (FPL) sought to have Armstrong and Cahill prosecuted for violating several provisions of the Montana Abortion Control Act. Arlette Randash (Executive Director of MRTL) and Charles Lorentzen (President of FPL) wrote to various government officials, asking them to investigate and prosecute plaintiffs Armstrong and Cahill. Randash asked the Montana Attorney General to "please investigate and inform me of what you find" regarding the performance of abortions by a physician assistant (plaintiff Cahill) working at Armstrong's office, allegedly in violation of Mont. Code Ann. § 50-20-109. Complaint Exh. C. Lorentzen claimed that Armstrong and Cahill were violating several provisions of Mont. Code Ann. § 50-20-109. He claimed that a letter sent by Armstrong to other physicians violated subsection 4's prohibition on "soliciting and advertising" abortions; that the performance of abortions by Cahill violated the "physician-only" provision of subsection 1(a); and that the performance of second-trimester abortions in Armstrong's office violated the "hospital-only" requirement of subsection 1(b). Complaint Exh. D.

None of the government officials contacted by Lorentzen informed him that the "soliciting and advertising" prohibition of the Montana Abortion Control Act had been permanently enjoined in 1976. Lorentzen Dep. at 44; *see Doe v. Deschamps*, 461 F. Supp. 682, 688-89 (D. Mont.

1976) (three-judge court) (enjoining solicitation prohibition). Nor did they inform him that the second-trimester hospitalization requirement of the Montana Abortion Control Act was unenforceable as a result of this Court's invalidation of similar statutes. Lorentzen Dep. 44; *see City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 438-39 (1983). Nor did the prosecutors recognize that Montana defined "licensed physician" as including physician's agents when it enacted the P.A. statute in 1983. Instead, County Attorney Esch ordered a criminal investigation of Armstrong and Cahill. Complaint Exh. G. That investigation was ended by the stipulated judgment entered by the district court in *Doe v. Esch*, No. 93-060-GF-PGH (D. Mont. Nov. 26, 1993) (judgment). *See* 33a-34a.

Frustrated by their failure to punish Armstrong and Cahill through the judicial process, the same anti-abortion activists turned to the Montana Legislature to punish Armstrong and Cahill. MRTL, through its lobbyist, Tim Whalen, drafted HB 442 and asked newly-elected Representative Susan Smith of Kalispell to sponsor the bill. Smith Dep. 15. She was promised documentation supporting the legislation's health basis, but never received such documentation, either before or after the bill was enacted. Smith Dep. 22-24. She stated that her reason for sponsoring HB 442 was MRTL's request that she do so. Smith Dep. 15. The legislative hearings were orchestrated by Whalen and Randash, private individuals acting for anti-abortion groups, who arranged for all the witnesses for the bill and distributed a fact sheet accusing Susan Cahill by name of performing illegal abortions. Randash Dep. 19. Thus, the legislative record clearly shows that HB 442 was enacted with the sole illegitimate purpose of punishing and inhibiting abortion providers, thereby making abortions

more difficult for women to obtain in Montana. Kottel Dec. ¶¶ 2-8.[2]

In fact, all health evidence contradicts the claim that there is any health basis for HB 442. The Board, which regulates and licenses P.A.'s, opposed HB 442, *see* 39a; 54a-55a, and the only extant study comparing the complication rates for first-trimester abortions performed by P.A.'s with those for first-trimester abortions performed by physicians found no significant difference. Complaint Exh. B (Mary Anne Freedman et al., *Comparison of Complication Rates in First Trimester Abortions Performed by Physician Assistants and Physicians*, 76 AM. J. PUB. HEALTH 550 (1986)). Further, Cahill, the only physician assistant affected by HB 442, has performed early abortions under Dr. Armstrong's supervision safely in Montana for over eighteen years. Cahill Dec. ¶ 9; Armstrong Dec. ¶ 16. Since HB 442 applies to all abortions, it covers both surgical and medical abortions, thus severely handicapping the ability of Montana physicians to use P.A.'s in medical abortion clinical trials. *See* Brown Dec.

HB 442 is a narrow criminal law that does not even pretend to regulate the authority of any of the other physician assistants in Montana who provide a wide array of other types of medical care that pose greater health risks than a first-trimester abortion. Cahill Dec. ¶¶ 10, 15; Armstrong Dec. ¶ 18. Indeed, on its face, the Montana

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[2]Concerned that the Attorney General might not adequately defend HB 442, Whalen sought to intervene on behalf of state representative Richard Simpkins because of the Attorney General's "outspoken political position with respect to the issue of abortion and the so-called right of women to abort their unborn children without restriction," Simpkins Aff. ¶ 5, and not because of the Attorney General's positions on women's health.

Abortion Control Act statute, which HB 442 amends, contains an explicit statement of its purpose and intent to prevent abortions:

> The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we affirm the intent to extend the protection of the laws of Montana in favor of all human life.
>
> It is the intent of the legislature to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation.

Mont. Code Ann. § 50-20-102 (statement of purpose); § 50-20-103 (legislative intent of Montana Abortion Control Act).

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because this case is in a procedural posture in which there has not even been a preliminary decision favorable to the respondents. Further, the State has failed to establish any of the factors that weigh in favor of a grant of certiorari. The decision of the court below is in conflict neither with the decisions of this Court nor with the decisions of other United States courts of appeals. Further, no important question of federal law is raised by this case "that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c). Accordingly, the petition should be denied.

I. THE ISSUES RAISED IN THE PETITION ARE NOT YET RIPE FOR REVIEW.

A. The Petition For Certiorari Should Be Denied Because The Court of Appeals Has Not Ruled On Respondents' Motion For A Preliminary Injunction.

The procedural posture of this case makes it particularly inappropriate for review by this Court. The decision of a court of appeals is not ripe for certiorari review when that court has deferred disposition of the motion before it until the conclusion of further proceedings in the district court. Indeed, as set forth at Point I(B) below, this Court typically does not grant certiorari in cases involving appeals from preliminary injunctions; and in this case, the district court has yet to complete its assessment under the preliminary injunction standard. This Court explicitly addressed this situation in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967). In that case, a petition for certiorari had been preceded by the following events:

> The District Court entered contempt orders, imposing substantial fines for alleged violation of its restraining order. The Court of Appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt, and, also, if there was a contempt, whether it was "of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey."

Id. at 327-28. In response to the petition for certiorari, this Court stated the following:

> Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied.

Id. at 328.

Like the petition in *Brotherhood*, the Petition in this case not only involves a non-dispositive motion, but the court of appeals has not yet even ruled on that motion. To the contrary, after concluding that the lower court used improper standards in denying injunctive relief, the court of appeals remanded the matter for further proceedings. *See* 8a. The court of appeals explicitly concluded that "it would be inappropriate to address the propriety of a preliminary injunction without the benefit of the district court's balancing of the hardships in light of this opinion." *Id.* In short, Petitioner asks the court to address a motion for preliminary injunction as to which the district court has not yet properly balanced the hardships and on which the court of appeals has not ruled. The prematurity of this request is strikingly illustrated by the fact that if the petition is granted, respondents will be in the difficult position of defending the decision of the court of appeals before this Court without even knowing if that decision ultimately leads to a grant or denial of their motion for preliminary injunctive relief.

B. The Interlocutory Nature Of The Proceedings In This Case Makes Review Inappropriate.

Absent extraordinary circumstances, this Court will not grant certiorari to review a lower court decision prior to final judgment in the case. *Hamilton-Brown Shoe Company*

v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916) (the Supreme Court's "jurisdiction to review the judgments and decrees of the circuit court of appeals by certiorari . . . is a jurisdiction to be exercised sparingly . . . And, except in extraordinary cases, the writ is not issued until final decree.") *See also Virginia Military Institute v. United States*, 113 S.Ct. 2431, 2432 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting) (referring to Court's "normal practice of denying interlocutory review"); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 196 (7th ed. 1993) (discussing Court's ordinary practice of denying interlocutory review); CHARLES A. WRIGHT ET AL., 17 FEDERAL PRACTICE AND PROCEDURE § 4036 at 27 (2d ed. 1988) (footnotes omitted) (Court's grant of certiorari before final judgment is "rare"). Accordingly, here, where the lower courts have not yet even rendered an interlocutory order favorable to respondents, review by this Court is perforce premature.

Sound reasons underlie this Court's restraint with respect to interlocutory review. First, the granting of certiorari prior to final judgment may engage the Court in wholly unnecessary decisionmaking:

> [M]any orders made in the progress of the suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Construction Co. v. Jacksonville, T. & K. W Ry. Co., 148 U.S. 372, 384 (1893). In addition, as Justice Stevens has noted, the Court's "violation of its normal practice of denying interlocutory review . . . [may] ill serve[] the interest of judicial economy." *Estelle*, 429 U.S. at 114-15 (Stevens, J., dissenting). Finally, in controversial cases such as this one, a grant of certiorari before final judgment may undesirably prevent the parties from fully developing and adjusting their positions. *See* WRIGHT, *supra*, § 4036 at 20-21 (discussing grant of certiorari prior to judgment in court of appeals). Accordingly, the interlocutory nature of a ruling is "itself alone . . . sufficient ground for the denial of the application [for certiorari]." *Hamilton-Brown Shoe*, 240 U.S. at 258.

Petitioner asks this Court to review the court of appeal's reversal and remand of the district court's partial denial of Respondents' preliminary injunction motion. A motion for preliminary injunction has the limited purpose of maintaining the status quo until the outcome of a trial on the merits, and the findings of fact and rulings of law made in the determination of that motion are not binding at trial. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Moreover, a motion for a preliminary injunction is often made in haste on the basis of incomplete evidence and arguments and without all of the formal procedures of a trial. *See id.* Thus, the Petition embodies all of the Court's reasons for denying interlocutory review: the decision of the court of appeals was made without the benefit of a complete factual record or fully developed arguments; its opinion does not represent its final determinations on the merits of the case; and the relevance of that opinion may be changed by the progress of the case.

Nor does this case fall within the limited circumstances in which this Court has granted certiorari to review

interlocutory decisions. Such review is only appropriate where the issue of law presented: is clear-cut; would otherwise qualify as a basis for certiorari; and is fundamental to the further conduct of the case. *Michael v. United States*, 454 U.S. 950, 951-52 (1981) (White, J., dissenting); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 196 (7th ed. 1993). *See also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945.) (reviewing lower court decision which presented a discrete issue of law on which the federal courts were in conflict, and which was "fundamental to the further conduct of the case"). These circumstances are not present here.

This Court has granted certiorari prior to final judgment to review particularly clear-cut issues. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (certiorari granted to consider whether allegation of tortious conduct by agent of sovereign made the suit one against the agent individually, rather than the sovereign). This case does not yet present such clearly-framed questions. According to Petitioner, the Court of Appeals erred in: (1) holding that Respondents have established a fair chance of success on their "undue burden" claim; and (2) construing the purpose prong of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), to require anything more than a rational basis examination of a statute's purpose. The lower court's rulings were made in the unique context of considering preliminary injunctive relief, which requires the courts to weigh a variety of legal and factual considerations and make hasty evaluations as to the nature and merit of the legal issues presented. In addition, a court's application of the undue burden test is a very complicated, and often fact-laden, task. *See, e.g., A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434 (S.D. Ind. 1995) (applying undue burden test), *appeal stayed*, No. 3965 (7th Cir. Jan. 22, 1995); *Women's Medical Prof'l*

Corp. v. Voinovich, 911 F. Supp. 1051 (W.D. Ohio 1995) (same), *appeal docketed*, Nos. 96-3157 & 96-3159 (6th Cir. Feb. 8, 1996). In these circumstances, the issues on which Petitioner seeks review simply cannot be found to be "clear-cut."

Second, as set forth below at Points II, this case would not in any event satisfy the factors that weigh in favor of granting certiorari. As the district court in this case noted, there is a "paucity of case law addressing the precise issue presented in this case." 20a. The courts have simply not yet decided, either directly or by analogy, whether under *Casey* a state may constitutionally pass a law prohibiting the previously legal practice of abortion by a qualified nonphysician medical provider. Moreover, the lower courts in this case have not yet ruled on that issue except to conclude that on the facts thus far presented, the complaint presents a serious question. With only this finding of possible success and the lack of other law addressing the matter, this case does not create a real conflict among the courts or present important federal questions which warrant review at this stage of the proceedings.

Finally, the issues addressed by the court of appeals are not so fundamental to further proceedings in the case as to merit interlocutory review. Such review has been granted where the issue presented went to the very nature of the proceedings or to the court's jurisdiction over those proceedings. *See, e.g.*, *Land v. Dollar*, 330 U.S. 731 (1947) (certiorari granted where court of appeals reversed district court's dismissal of case on basis of lack of jurisdiction); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959) (certiorari granted to review lower court rulings depriving party of right to jury trial). The issues presented by the Petition do not go to the nature of the proceedings, but to the merits of Respondents' claims.

Interlocutory review has also been granted where the lower courts have ruled on the ultimate merits of a party's claims. *See, e.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) (certiorari granted where district court struck certain claims from complaint); *Estelle*, 429 U.S. 97 (certiorari granted where court of appeals reversed district court dismissal of case on the merits). Neither lower court in this case has made anything more than a preliminary assessment of the merits of Respondents' claims. On the contrary, as discussed below, the court of appeals has not yet even disposed of Respondents' preliminary injunction motion.[3] Thus, the Petition fails to establish that this case falls within one of the narrow categories in which this Court grants certiorari on an interlocutory order.

C. The Petition Improperly Seeks Determination Of A Constitutional Issue On Which The Lower Courts Have Not Yet Ruled.

Petitioner seeks a determination from this Court that Respondents have no chance of success on their undue burden claim. This request is inappropriate for a number of reasons in addition to those already discussed. First, Petitioner asks the Court to make a constitutional determination which may not be necessary to resolution of this case. *Spector Motor Service, Inc. v. McLaughlin*, 323

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[3]By contrast, in the cases in which this Court has reviewed a decision on preliminary injunctive relief, the court of appeals had already ruled that a preliminary injunction either was or was not warranted. *See, e.g., Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993) (certiorari granted where court of appeals reversed district court's denial of preliminary injunction and ordered entry of that injunction); *International Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466 (1991) (certiorari granted after court of appeals affirmed district court's issuance of preliminary injunction).

U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."). The courts below have only ruled that Respondents have shown a "fair chance" of success. Thus, those courts may yet decide that Respondents have failed to prove their claims. Further, the determination Petitioner now seeks has not yet been made or rejected by the lower courts, but will be made or rejected by the district court on remand. That determination can be more appropriately made after summary judgment or trial than after ruling on a motion for preliminary injunction. *See Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring in denial of stay) (emphasizing fact-intensive nature of undue burden test).

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH CASES DECIDED BY THIS COURT AUTHORIZING STATES TO LIMIT THE PERFORMANCE OF ABORTIONS TO LICENSED PHYSICIANS.

The State argues that the finding of the court below that plaintiffs have a "fair chance of success" on the merits of their case is *per se* incorrect because decisions of this Court have indicated that States may limit the performance of abortions to licensed physicians. But this argument misses the mark for two reasons. First, Montana gives certain broad agency rights to all licensed physicians to augment their practices by utilizing P.A.'s. Second, Montana explicitly licensed a trained non-physician -- respondent Cahill, a physician assistant-certified -- to perform abortions. HB 442 is a criminal statute that terminated her ability to do so with the *purpose* and *effect*

of imposing a substantial obstacle in the path of women seeking abortions.[4]

Moreover, the statute's termination of Cahill's legal ability to perform abortions, after the attempts to prosecute her and Armstrong failed, was motivated by a desire to punish her, and in fact imposed a traditional punishment upon her, and therefore violates the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution. Thus, even assuming *arguendo* that the Montana Legislature acted within the constitutional bounds of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in enacting HB 442, it violated a distinct

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[4]Before HB 442, the Montana Legislature expressly extended that scope of practice of physicians to include the right to use state-approved P.A.'s to perform enumerated state-approved procedures. HB 442 is a restriction on respondent Armstrong's right to practice medicine. Thus, contrary to the State's suggestion, Pet. 19 & n.5, a finding that plaintiffs have a fair chance of success on the merits is irrelevant to other state laws restricting the practice of abortions to licensed physicians. Further, this statute was enacted with the impermissible purpose of impeding access to abortion services, and with the impermissible effect of eliminating one qualified abortion provider. Also, as set forth at Point II(B) below, these statutes -- unlike HB 442 -- were not intended as punishment of an individual abortion provider, and therefore do not implicate the Bill of Attainder Clause.

Finally, it is not at all clear that other state statutes prohibit a physician from utilizing a physician assistant to perform first-trimester abortions under the physician's supervision. For example, the New York State Health Department has construed its statute limiting the practice of abortion to licensed physicians, together with its later-enacted statute regarding practice of physician assistants, to *permit* physician assistants to perform abortions. Opinion Letter of State of New York Department of Health to Donna Lieberman (Dec. 20, 1994) at 1 (opining that physician assistant statute "supersedes the physician requirement of the [New York] Penal Law and permits PAs to perform abortions").

constitutional provision entirely unrelated to whether or not States may limit the practice of abortions to licensed physicians. Accordingly, the court below properly held that plaintiffs have a fair chance of success on the merits.

A. Dicta In This Court's Cases Indicating That States May Constitutionally Limit The Practice Of Abortions To Licensed Physicians Are Not In Conflict With The Decision Of The Court Of Appeals.

HB 442 is not rendered constitutional simply because this Court has stated in *dicta* that "it is permissible for the States to impose criminal sanctions on the performance of an abortion by a nonphysician." *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 430 n.12 (1983) (citing *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975)). No Supreme Court decision has approved the criminalization of abortion by a nonphysician *when the abortion is performed under the direct supervision of a physician, and under the auspices of a state medical board, by a competent non-physician medical provider*. Indeed, *Menillo* spoke not simply of a right to choose an abortion performed by physicians, but of "*a woman's right to a clinical abortion by medically competent personnel*." *Menillo*, 423 U.S. at 10 (emphasis added). Because Cahill is "medically competent" to perform an abortion under the supervision of a physician, her continuing ability to do so falls squarely under the protection of *Roe* and *Casey*.

Moreover, none of the statements in this Court's opinions, or other court opinions, affirming the authority of states to limit the performance of abortions to physicians, applies to circumstances like those of this case. In *Menillo*, for example, the Court was reviewing the conviction of a

layman who "ha[d] never had any medical training." 423 U.S. at 9. Similarly, no lower federal court opinions hold that a State may bar a physician from utilizing a properly trained medical professional from performing abortions under his supervision, in the context of an elaborate state licensing scheme that gives all other physicians the right to utilize their agents to perform other medical procedures of equal risk. Rather, these cases simply reiterate that a state may limit the performance of abortions by nonphysicians, either in *dicta* or in contexts unrelated to the performance of abortions by competent nonphysician medical providers. *See Birth Control Ctrs., Inc. v. Reizen*, 743 F.2d 352, 364 (6th Cir. 1984) (holding that because Michigan rule did not impose requirement of special physician expertise, it was consistent with *Roe*); *Florida Women's Medical Clinic, Inc. v. Smith*, 536 F. Supp. 1048, 1057 (S.D. Fla. 1982) (rejecting challenge "if one has been made" to regulation mandating that first-trimester abortions be performed by a licensed physician), *appeal dismissed*, 706 F.2d 1172 (11th Cir. 1983); *Smith v. Bentley*, 493 F. Supp. 916, 927 (E.D. Ark. 1980) (three-judge court) (invalidating, as applied to physicians, Arkansas statute that criminalized abortion performed by "anyone," but observing that it could still be applied to "laymen"); *Planned Parenthood v. Ashcroft*, 483 F. Supp. 679, 684-85 (W.D. Mo. 1980) (application of Missouri statute to "nonphysician performing an abortion *on another person*" was not challenged in case challenging application of statute to self-induced abortions) (emphasis in original), *aff'd in part & rev'd in part on other grounds & remanded*, 655 F.2d 848 (8th Cir. 1981), *aff'd after remand*, 664 F.2d 687 (8th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, 472 U.S. 476 (1983); *see also Wright v. State*, 351 So. 2d 708, 710 (Fla. 1977) (addressing only severability of physician requirement, not its substantive validity). None of these cases lends support to the proposition that a State, having once authorized a

medically competent nonphysician to perform abortions, may subsequently withdraw that authorization solely to achieve the impermissible purpose, and with the unconstitutional effect, of making abortion less accessible to women.

This Court in *Roe* wrote that a state "may define the term 'physician' . . . to mean only a physician currently licensed by the State. . . ." 410 U.S. at 165. But a State is not free to define physician in one way for medical practice generally, and another way for those physicians who decide to provide abortion services. Because Montana has, in its 1983 statute regulating physician assistants, elaborately set forth a definition of a physician's scope of practice that includes P.A.'s, it should not now be heard to argue that it has one definition of "licensed physician" for a single doctor in the State -- Dr. Armstrong -- and another, broader definition that applies to the hundreds of other physicians in the State.

Finally, this Court has recognized that advances in medicine may result in invalidation of previously valid restrictions on abortion. For example, in *City of Akron*, 462 U.S. at 438-39, this Court held that it is unconstitutional to require all second-trimester abortions to be performed in hospitals -- something the *Roe* Court spoke of approvingly. *Roe*, 410 U.S. at 163; *see also Akron*, 462 U.S. at 435-36 (chronicling dramatic increase in safety of second-trimester abortions since *Roe*). Similarly, *Roe* did not anticipate that early abortions could be performed with pills; but today first trimester abortions are performed not only surgically but medically. *Roe* also did not anticipate that mid-level health care professionals would be utilized throughout the United States to work with physicians as physician extenders, performing a wide range of medical

procedures and with authority to prescribe virtually any drug.

B. Respondents' Bill Of Attainder Claim Is Fully Supported By This Court's Bill Of Attainder Precedents.

The same purpose analysis that establishes a likelihood of success for respondents on their undue burden claim establishes a likelihood of success on the bill of attainder claim. Under either claim, HB 442 does not serve a "legitimate health function."

In discussing the purpose inquiry to be conducted on remand by the district court, the court below wrote that HB 442 must be scrutinized to determine "whether that statute in fact can be regarded as serving a legitimate health function." 7a. The court of appeals held that "the district court's view of its ability to consider the purpose or effect of the legislation was unduly confined for the purpose of determining whether appellants have a fair chance of ultimate success." 6a. This broader purpose inquiry establishes that respondents have a high probability of succeeding on their bill of attainder claim; this claim exactly fits this Court's bill of attainder jurisprudence, which seeks to protect disfavored individuals or classes of individuals -- like Communists or abortion providers -- from legislative punishment. Thus, an independent reason that the petition should be denied is that HB 442's purpose, properly scrutinized, supports a meritorious claim not only under *Casey* but under the Bill of Attainder Clause. The largely undisputed evidence that HB 442 was enacted solely to punish respondent Cahill and serves no legitimate health function establishes a likelihood of success both as to

respondents' undue burden purpose claim, and respondents' claim that HB 442's purpose is punitive.

The district court did not apply the correct constitutional standards governing bill of attainder claims. Indeed, the district court's review of plaintiffs' bill of attainder claim is so deferential and perfunctory that it renders the bill of attainder clause a nullity. Although few statutes have been invalidated as bills of attainder, the facts in this case fit the motivational, functional and historical tests for establishing legislative punishment under bill of attainder doctrine like a glove. HB 442 is a criminal statute singling out the only P.A. who provides abortions in Montana and removes only her authorization to practice the core specialty of her profession. In the context of an elaborate regulatory scheme licensing P.A.'s to do surgical and other procedures, only one procedure -- abortion -- was singled out. The State Board of Medical Examiners, which licenses Cahill and other P.A.'s, told the Montana Legislature it opposed HB 442 because it "isolated" one group of health care providers, and "singled out" that group. *See* 54a-55a.

Respondents Cahill and Armstrong fulfill the three elements necessary to prove a bill of attainder: specificity, punishment, and lack of a judicial trial. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847, 852 (1984). The court of appeals appropriately remanded the case to the district court for determination of whether respondents have a fair chance of success of meeting these elements in their challenge to HB 442. Only the "punishment" prong is in dispute.[5]

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[5]As to specificity, the law targets only Ms. Cahill's ability to perform abortions under Dr. Armstrong's supervision; no other physician has (continued...)

In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Court described three tests for what constitutes "punishment" necessary to defeat a law under the Bill of Attainder Clause: the historical test; the functional test; the motivational test. *Id.* at 473, 475-476, 478; *Selective Service System*, 468 U.S. at 852. Respondents satisfy all three tests, yet only *one* of must be met to prevail. *Id.*, 468 U.S. at 847, 852; *see also* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 652-55 (1988 ed.).

The historic test asks whether a statute imposes a form of punishment or disability that has been historically condemned as an attaint. *Selective Service System*, 468 U.S. at 853. Stripping an individual of her vocation, as HB 442 does to Ms. Cahill, is a traditional punishment. As pointed out by this Court in *Nixon*, legislative enactments barring individuals or groups from a particular vocation are historically a form of punishment condemned by the Bill of Attainder Clause. *Nixon*, 433 U.S. at 474-75; *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (barring clergymen from ministry in the absence of subscribing to a loyalty oath); *United States v. Lovett*, 328 U.S. 303 (1946) (barring named individuals from government employment); *United States v. Brown*, 381 U.S. 437 (1965) (barring communist party members from offices in labor unions). The court of appeals decision to remand to the district court is consistent with these cases.

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[5](...continued)
ever applied to utilize a P.A. to perform abortions in Montana. *See* 25a n.4 (district court observation that "Susan Cahill is the only physician assistant-certified who presently performs abortions in the State of Montana."). Petitioner has not disputed that HB 442 eliminates Ms. Cahill's vocation and punishes her without a judicial trial.

The functional test asks whether the law, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475-476; *see also Selective Service*, 468 U.S. at 853-54. The only "nonpunitive" purpose proffered by the State is the purpose of promoting health. The court of appeals properly rejected the district court's belief that it was unable to "impugn" this alleged purpose.

The district court made no analysis of the type and severity of this law, which is to be balanced against the degree to which a law might further a nonpunitive end. The severity of this prohibition is complete. Susan Cahill cannot, ever, perform abortions in Montana. In contrast to this case, in *Nixon* there were circumstances mitigating the severity of the law: the Court noted that President Nixon was compensated for his papers, 433 U.S. at 475, had complete access to them, *id.* at 481 n.46, there was a time limit on retention, *id.* at 481, and that the law did not affect the core of his job. Similarly, in *Selective Service*, 468 U.S. at 850-51, the Court found the selective service registration statute not as prohibitive as the statutes prohibiting vocations in *Cummings* and *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), because students could register late, and still get financial aid without being penalized.

The Bill of Attainder Clause is one of the few constitutional provisions that on its face mandates rigorous scrutiny into intent, for the "very nature of the constitutional question requires an inquiry into legislative purpose." *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968). The phrase "reasonably furthers," in cases involving constitutional scrutiny, means more than low-level rational basis scrutiny. For example, in *Hodgson v.*

Minnesota, 497 U.S. 417 (1990), this Court struck down an abortion law requiring notice to both parents because, looking at the evidence, it found that the law "does not reasonably further any legitimate state interest." *Id.* at 450. The Court found further that the statute was not only ineffective in achieving legitimate state goals, but was actually counterproductive in some family situations. *Id.* at 450-51. *See also Turner v. Safley*, 482 U.S. 78, 97-99 (1987); *Carey v. Population Services Int'l*, 431 U.S. 678, 716 (1977) (Stevens, J., concurring in part and concurring in the judgment).[6]

The third test for what constitutes "punishment" is the motivational test, which is an inquiry into whether the legislative intent was punitive. *Selective Service*, 468 U.S. at 852. In Bill of Attainder cases, like undue burden purpose cases, *see Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), *petition for cert. filed*, No. 96-1481 (docketed Mar. 18, 1997), the purpose inquiry is part of the constitutional test. Therefore, as under the Establishment Clause, *see Edwards v. Aguillard*, 482 U.S. 578, 586-87

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[6]In *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981), this Court conducted a similar examination under the Commerce Clause of whether an Iowa law restricting certain trucks would further an ostensible health and safety purpose. The Court reviewed approvingly a 14-day district court trial on safety comparisons which concluded that the prohibited 65 foot trucks were as safe as 55 foot trucks. *Id.* at 667-68. Moreover, just like the burden this law would impose by rerouting women in Montana, the Supreme Court found the Iowa restriction irrational because rerouting trucks around Iowa would have the effect of causing more accidents. *Id.* at 674-75. Further, unlike in *Kassel*, in which Iowa at least presented some evidence on safety, the State in this case has never presented any evidence showing how the existing P.A. scheme harmed women or how the health of women would be promoted by excluding Ms. Cahill from providing abortions.

(1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), "primary purpose" should be the defining standard. .

As shown by plaintiffs' unrebutted evidence, the facts leading up to this legislation, the elaborate state P.A. licensing scheme, the opposition to the bill by the State Medical Board, the discriminatory design of the statute, the unusual manner in which it was introduced and passed, the statements of the sponsor, and the detrimental impact on women's health, all prove that HB 442 has an invalid purpose to block access to abortion by punishing respondents Cahill and Armstrong.

Moreover, the question of whether HB 442 actually furthers the asserted goal of protecting women's health is one the district court must independently examine not just under the functional test, but as further evidence of the statute's true purpose. Under the Commerce Clause, for example, in the *Kassel* case, the Court found that the design of the statute (exempting trucks carrying Iowa livestock) and its inevitable effect were both *proof* of an impermissible protectionist purpose. *Id.*, 450 U.S. at 676-77.

Under *Nixon*'s motivational test, the purpose of HB 442 is not to further women's health in Montana, but to carry out the punitive goals of the Montana Right to Life Association and other anti-abortion groups who had previously sought to achieve their goals by asking the Executive Branch (law enforcement authorities) to prosecute respondents Cahill and Armstrong for precisely the same acts made criminal by HB 442.

Because respondents' Bill of Attainder claim is entirely consistent with this Court's cases construing the Bill of Attainder Clauses, the court of appeals properly vacated the district court's decision and instructed it to balance the

hardships. Thus, all the factors that this Court considers in deciding whether to grant certiorari indicate that the petition should be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: March 28, 1997.

Respectfully submitted,

BRUCE MEASURE
Law Offices of
Ambrose Measure
P.O. Box 918
Kalispell, MT 59903
(406) 752-6373

TURNER GRAYBILL
Graybill, Ostrem,
Warner & Crotty
18 Sixth St. North
Great Falls, MT 59401

JANET BENSHOOF
(Counsel of Record)
SIMON HELLER
BONNIE S. JONES
The Center for
Reproductive Law &
Policy
120 Wall St., 18th Fl.
New York, NY 10005
(212) 514-5534

Counsel for Respondents